BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF COLORADO

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DOCKET NO. 04R-510T

RULES RELATING TO THE REGULATION OF OPERATOR SERVICES FOR TELECOMMUNICATIONS SERVICE PROVIDERS AND TELEPHONE UTILITIES

EXCEPTIONS OF MCI, INC.

MCI, Inc., on behalf of its regulated subsidiaries, submits the following exceptions to Decision Number No. R04-1543, mailed December 28, 2004.[1] In the alternative, MCI requests the Commission reopen the record in this proceeding to allow parties to supplement their comments and oral presentations with cost data that the ALJ found was lacking and inadequate.

A transcript of this proceeding has been filed with the Commission. A copy of the transcript is attached hereto for the convenience of the Commission. MCI also incorporates by references its verified opening comments filed in the docket on November 30, 2004. Finally, the record in this proceeding includes all comments filed in this docket. Because this is a rulemaking proceeding, the Commission can rely on all written comments and other documents contained in the Commission's file for this docket, including comments filed by any other entities or individuals. In his oral comments made in the hearing, the ALJ stated that the written comments would be "taken into account" when his recommended decision was written.[2] That

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[1] Rules Relating To The Regulation Of Operator Services For Telecommunications Service Providers And Telephone Utilities, Decision No. R04-1543, Docket No. 04R-510T, Recommended Decision of Administrative Law Judge Anthony M. Marquez Adopting Rules, (*ALJ Decision*), Mailed Date, December 28, 2004.
[2] Transcript, at page 7, lines 12 – 16.

said, the ALJ failed to properly take into account matters that were in the record either through filed written comments or the oral presentation made by Qwest witness, Paul McDaniel.

I. INTRODUCTION AND STATEMENT OF POSITION

Based upon the existing record in this proceeding, the Commission should at least increase the allowable payphone compensation surcharge from $0.52 recommended by the administrative law judge ("ALJ") in his above-mentioned decision, to a minimum of $0.54. However, as MCI argued in its comments, the Commission should allow the market to set rates for the administrative component of carriers' payphone compensation surcharges and not cap the payphone compensation surcharge at all.

II. SUMMARY OF ARGUEMNTS

First, the ALJ erred by failing to allow any increase in the per-call costs of administering payphone compensation. Such a ruling could only be justified on the assumption that administrative costs associated with administering payphone compensation are 100% variable and that carriers' incur no fixed costs to administer payphone compensation. There is no evidence in the record to make such a determination. Moreover, only under this assumption could the undisputed 60%[3] decline in call volumes over which these administrative costs are spread by all carriers not yield some increase in the $.02 per call administrative fee the Commission had previously sanctioned. In fact, 97% of MCI's costs of administering payphone compensation are fixed.

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[3] See, MCI Comments filed November 30, 2004, at page 3, and the Report and Order of the FCC issued In the Matter of Request to Update Default Compensation Rate for Dial-Around Calls from Payphones, Report and Order ("FCC R&O"), WC Docket No. 03-225, FCC 04-182, rel. August 12, 2004, at & 80 referenced in MCI's comments in footnote 8.

Second, the ALJ erred by adopting the former $.02 per call administrative fee this Commission had previously approved, but wrongly argued that it may not adopt market-based rates. The $.02 administrative component of the payphone surcharge adopted by the Commission was in fact a market-based rate that had already been established through competition among carriers, and was not adopted as a result of a filing showing the per-call cost of administering payphone compensation. In short, the Commission had previously accepted market-based rates as appropriate for the setting of the administrative component of payphone compensation when it approved the $.26 surcharge. This surcharge was based upon the $.24 per call amount paid to payphone service providers, and $.02 per-call amount that the market had already established for carriers to comply with their payphone compensation obligations. The Commission may not at this time reject this method without showing that its previous market-based rate was unreasonable that current market-based rates would also fail to be reasonable.

Third, the ALJ erred by finding that no costs studies were introduced in this proceeding to support requests of MCI or Qwest. Indeed, Qwest provided cost data through the oral comments provided by Qwest witness, Paul McDaniel, wherein he stated that Qwest's total service long run incremental cost ("TSLRIC") was $0.53 and that if the network and support costs were included, its costs were $0.70.[4]

Finally, the ALJ erred by failing to find that Section 276 of the Telecommunications Act of 1996 only delegates surcharge authority to the Federal Communications Commission ("FCC"), to require interexchange carriers ("IXCs") to compensate payphone service providers

[4] See, Transcript at page 6, lines 10 – 14.

for completed dial-around calls.[5] In fact, Section 276 imposes no payphone obligation on IXCs. The FCC's First Payphone Report and Order used its authority under Section 276 to establish a payphone compensation system that simultaneously imposed a payphone compensation obligation on IXCs and approved a market-based method by which IXCs could recover their costs of administering this obligation. The same FCC Order that preempted the states from determining the party responsible for payphone compensation also preempted the states from determining the method by which those parties could recover the costs of this obligation.

III. ARGUMENT

A. FAILURE TO ALLOW ANY INCREASE IN THE PER-CALL COST OF ADMINISTERING PAYPHONE COMPENSATION IN THE FACE OF A 60% DECLINE OVER WHICH THESE COSTS ARE SPREAD IS ARBITRARY AND CAPRICIOUS AND NOT SUPPORTED BY THE RECORD OF THIS PROCEEDING

The ALJ rejected MCI's argument that the $.02 per-call cost of administering payphone compensation should rise proportionate to the 60% decline in call volume, thereby justifying at least a $.544 surcharge for completed dial-around calls.[6] The rationale the ALJ gives for his rejection is that not all administrative costs may be fixed, some may be variable.[7] On this basis, the ALJ concludes that no increase in the per-call cost of administering payphone compensation is justified. This conclusion rests on the unfounded and indefensible speculation that payphone administration costs may be 100% variable. The record in this proceeding does not support this finding. For example, 97% of the costs of MCI's payphone administration are fixed. MCI's costs break down into 4 basic categories. With the exception of bad debt, which accounts for

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[5] "…§ 276(b)(1)(A) speaks only to the FCC's power to establish dial-around compensation, the payment to be made by IXCs to PSPs. That statute does *not* relate to the charge to be assessed by IXCs upon end-users to recover the costs of dial-around compensation." (italics already in text) *ALJ Decision*, & 14.

[6] MCI Comments at 5.

[7] "It may well be that a $.02 per call allowance for recovery of administrative costs for dial-around calling is compensatory regardless of the volume of calls (*e.g.,* if these costs are primarily variable)." See ALJ Decision, &21.

only 3% of MCI's payphone costs, all other categories are not traffic sensitive. First, MCI has paid approximately a constant annual fee to the National Payphone Clearinghouse ("NPC") to determine proper ownership claims, determine whether numbers that have been payphone numbers in the past remain legitimate payphone numbers, to distribute quarterly payments to payphone owners, and to perform special studies. Second, MCI has retained the same number of full time equivalent employees internally in order to manage its payphone compensation system. In fact, with the new million dollar annual audit requirement recently imposed on all carriers by the FCC, MCI's costs and staff hours devoted to payphone compensation have increased, in spite of declining call volumes. Third, MCI has not reduced the computers, databases, or network facilities devoted to tracking payphone calls to completion. Fourth bad debt accounts for approximately 3% of MCI's costs, and so the per-call costs associated with payphone compensation would decline at most only 3%. However, as discussed above, MCI's costs have increased in other categories. Therefore, at a minimum, the 60% decline in call volumes over which MCI's fixed costs accounting for 97% of its administrative costs, would justify an increase from the previously approved $.02 for the per call administrative component to $.0485[8], resulting in a minimum surcharge of $.54 surcharge per call.[9]

B. THE ALJ DECISION WRONGLY FINDS THAT THE COMMISSION MAY ONLY ADOPT PAYPHONE SURCHARGES THAT ARE COST-BASED

MCI's Comments argued that the Commission should allow the market to determine the appropriate rate by which carriers recover their per-call administrative costs. The ALJ rejected this argument, stating that "MCI's suggestion for market-based rates would violate § 40-15-

[8] (.02/.4)*.97 = $.0485
[9] $.494 + $.0485 = $.5425

302(5), C.R.S., and cannot be adopted."[10] However, the $.02 administrative component of the payphone surcharge previously approved by this Commission was, in fact, a market-based rate that had been established by competition among carriers. Put differently, this Commission allowed carriers to recover a surcharge of $.26 per dial-around call that was already the industry norm. Of this amount, $.24 went to the payphone service provider, and $.02 was the established by the market to recover carriers' costs of administering their payphone compensation obligation. Thus, the Commission has already accepted market-based rates as appropriate for the setting of the administrative component of payphone compensation, and may not at this time reject this method of rate determination without showing that the previous market-based rate failed to protect the public, and that current market-based rates would also fail to be reasonable.

MCI submits that the previous market-based rate was reasonable. It was formed on the basis of intense competition among many carriers. It is common knowledge that the intensity of competition for customers has dramatically increased since 1998, when the $.02 was established by the market. There is every reason to believe that continuing to rely upon market-based rates would result in reasonable rates. Inasmuch as the Commission has already relied upon market-based rates for the administrative component for payphone compensation surcharges for nearly a decade, it should continue to do so now.

C. COST DATA WAS INTRODUCED IN THIS PROCEEDING WHICH WAS GIVEN NO WEIGHT WHATSOEVER

The ALJ erred by finding that there was no cost data to support MCI's and Qwest's assertion that the appropriate payphone compensation surcharge was $0.55. In fact, Qwest provided cost data, albeit not what the ALJ termed a cost study, but through the oral comments provided by Qwest witness, Paul McDaniel, wherein he stated that Qwest's total service long run

[10] ALJ Decision, & 25.

incremental cost ("TSLRIC") was $0.53 and that if the network and support costs were included, its costs were $0.70.[11] Moreover, if a "cost study" was critical, on what basis did the ALJ conclude that the $0.02 rate was cost-based and just and reasonable other than adopting what was proposed? In addition, nothing in the Notice of Proposed Rulemaking ("NPRM") suggested that the companies should have filed individual cost studies in a rulemaking. The NPRM sought "comments" on the proposed rules, not testimony or cost studies. Cost studies ordinarily are provided in adjudicatory or ratemaking proceedings, not rulemaking proceedings, and are also ordinarily subject to substantial discovery, which is not allowed in rulemaking proceedings.[12] Finally, as noted above, MCI can provide further factual information to demonstrate from a cost perspective that if the Commission sets a rate, the proposed rate is too low and does not take in account cost data provided by Qwest. Moreover, MCI's fixed costs would support a higher rate as stated in as footnote 9 and the statements contained in its first argument regarding the magnitude of MCI's fixed costs.

In the alternative, MCI requests that Commission reopen the record in this proceeding and to allow MCI and other carriers to file "cost studies". MCI can provide cost data to support its proposed rate as discussed in its first argument. Moreover, Qwest advised that it had cost studies to support the cost comments of Mr. McDaniel. Reopening the record is not prejudicial to parties that may charge payphone compensation surcharge now, because the emergency rules remain in effect and may continue in effect during the time this proceeding is pending. The Commission has adopted emergency rules that are effective for up to 210 days from the date the emergency rules were adopted on September 24, 2004.

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[11] See, Transcript at page 6, lines 10 – 14.
[12] Rule 77(b)(1), Commission's Rules of Practice and Procedure found at 4 CCR 723-1-77(b)(1)

D. SECTION 276 OF THE TELECOMMUNICATIONS ACT OF 1996 DELEGATED SURCHARGE AUTHORITY TO THE FEDERAL COMMUNICATIONS COMMISSION

Finally, the ALJ found that Section 276 of the Telecommunications Act of 1996 does not delegate surcharge authority to the FCC, only authority to require IXCs to compensate payphone service providers for completed dial-around calls.[13] However, Section 276 does not impose a payphone compensation obligation on IXCs. The FCC's *First Payphone Report and Order* used its authority under Section 276 to simultaneously impose a payphone compensation obligation on IXCs and approve a market-based method by which IXCs would recover their costs of administering this obligation. The relevant section is worth quoting, because the same paragraph in which the Commission places the compensation obligation on IXCs also allows IXCs to recover their administrative costs as they see fit.

> …the carrier-pays system also gives IXCs the most flexibility to recover their own costs (of administering payphone compensation), whether through increased rates to all or particular customers, through direct charges to access code call or subscriber 800 customers, or through contractual agreements with individual customers. Although some commenters would have the Commission limit the ways in which carriers could recover the cost of per-call compensation, we conclude that the marketplace will determine, over time, the appropriate options for recovering these costs. *In addition, under the carrier-pays system, individual carriers, while obligated to pay a specified per-call rate to PSPs, have the option of recovering either a different amount from their customers*, including no amount at all.[14] (Emphasis added)

More recently, the FCC has made crystal clear that it intended competition among carriers to reasonably determine the amount by which carriers could recover their cost of administering their payphone compensation obligations.

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[13] "…§ 276(b)(1)(A) speaks only to the FCC's power to establish dial-around compensation, the payment to be made by IXCs to PSPs. That statute does *not* relate to the charge to be assessed by IXCs upon end-users to recover the costs of dial-around compensation." (italics already in text) *ALJ Decision*, & 14.

[14] Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996, CC Docket No. 96-128 Report and Order on Remand, FCC 96-338, (*First Payphone Report and Order*), rel. September 20, 1996, & 83.

> In a market with unregulated prices, the carriers were entitled to charge their customers a surcharge for per-call compensation or, indeed, to raise the retail rate to any level they think the market will bear.[15]

The same FCC Order that preempted the states from determining the party responsible for payphone compensation also preempted the states from determining the method by which those parties could recover the costs of this obligation. The Commission should therefore allow market-based payphone compensation surcharges.

IV. CONCLUSION

For the reasons discussed above, MCI urges the Commission to adopt the positions advocated herein or, in the alternative, reopen this matter for the receipt of cost studies from carriers.

Dated: January 18, 2005.

MCI, INC.

By: _____

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[15] In the Matter of Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996, CC Docket No. 96-128, Fifth Order On Reconsideration And Order On Remand, rel. October 23, 2002, FCC 02-292, & 80.

Statement of Verification

I have read the foregoing, and to the best of my knowledge, information, and belief, there is good ground to support it, and it is not interposed for delay. I verify under penalty of perjury that the foregoing is true and correct.

Executed on January 18, 2005

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Certificate of Service

I hereby certify that I sent a true and exact copy of the within Exceptions by U. S. Mail, first class postage prepaid, addressed to:

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